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CLERK, U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 ANASTASIA HELENE KIRKEBY,
11 Plaintiff,

12 vs.

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16 LARRY BURNS aka LAWRENCE F.
17 BURZYNSKI, et al.,
18 Defendants.

CASE NO. 14-CV-2883-BEN (NLS)

ORDER:

**(1) GRANTING MOTION TO
DISMISS FOR LACK OF
JURISDICTION**

**(2) DENYING MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM AS MOOT**

**(3) GRANTING PLAINTIFF
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

[Docket Nos. 18, 26, 30]

19 Before this Court is a Motion to Dismiss for Lack of Jurisdiction, filed by
20 Defendants JP Morgan Chase Bank, N.A., and California Reconveyance Company.
21 (Docket No. 26.)

22 **BACKGROUND**

23 On December 5, 2014, Mrs. Kirkeby brought this action asserting multiple
24 claims against five defendants. (Docket No. 1.) On January 12, 2015, Plaintiff
25 Anastasia Kirkeby filed a First Amended Complaint asserting seven state law
26 claims: (1) violation of California Penal Code § 529, (2) California Civil Code §
27 3426, (3) California Penal Code § 502, (4) breach of the duty of loyalty and aiding
28 and abetting breach of fiduciary duty, (5) conversion, (6) intentional interference

1 with a contract, (7) California Business and Professions Code § 17200. Mrs.
2 Kirkeby's First Amended Complaint removed three defendants and added three new
3 defendants. She also added her husband, Glenn Kirkeby, as a co-plaintiff.

4 DISCUSSION

5 I. Defendants' Motion to Dismiss for Lack of Jurisdiction

6 Defendants JP Morgan Chase Bank, N.A., and California Reconveyance
7 Company argue this Court lacks subject matter jurisdiction over Plaintiff's case.
8 Plaintiff filed an Opposition.

9 A. Federal Question Jurisdiction

10 District courts have original jurisdiction over civil actions arising "under the
11 Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

12 Plaintiff's First Amended Complaint alleges that Defendants violated seven
13 California state laws.¹ Because the Complaint alleges no federal claims, this Court
14 does not have federal question jurisdiction over this matter.

15 B. Diversity Jurisdiction

16 District courts have original jurisdiction over civil actions where (1) the
17 amount in controversy exceeds \$75,000, and (2) there is complete diversity of
18 citizenship. 28 U.S.C. § 1332(a). Complete diversity of citizenship exists where no
19 plaintiff is from the same state as any Defendant. *Abrego Abrego v. Dow Chem.*
20 *Co.*, 443 F.3d 676, 679 (9th Cir. 2006) (citing *Exxon Mobil Corp. v. Allapattah*
21 *Servs., Inc.*, 545 U.S. 546 (2005)).

22 Complete diversity does not exist here. Plaintiff alleges that she and her
23 husband are citizens of California. She alleges that Defendant Larry Burns or
24 Lawrence Burzynski is also a citizen of California. Because at least one plaintiff is

25
26 ¹Plaintiff briefly mentions a criminal statute, 18 U.S.C. § 1001, in attempt to
27 support her claim that Defendants violated California Penal Code § 529. (FAC 19.)
28 Section 1001 is a criminal statute which provides no private right of action. *Willems*
v. Apartment Inv. & Mgmt. Co., 72 F. App'x 700, 701 (9th Cir. 2003). In the event this
mention of section 1001 should be construed as a claim against Defendants, the claim
is dismissed with prejudice.

1 a citizen of the same state of at least one defendant, this Court does not have
2 diversity jurisdiction over this case.

3 Plaintiff failed to establish this Court has subject matter jurisdiction over this
4 action. The Court therefore **GRANTS** Defendants' Motion to Dismiss for Lack of
5 Jurisdiction.

6 **II. Plaintiff's Motion for Leave to Amend**

7 On February 19, 2015, Plaintiff filed an Ex Parte Motion for Leave to File a
8 Second Amended Complaint. (Docket No. 30.) Defendants filed an Opposition.

9 Pursuant to Federal Rule of Civil Procedure 15, courts "should freely give
10 leave when justice so requires."

11 Plaintiff contends that a second amended complaint will enable her to show
12 that this Court has subject matter jurisdiction over this matter. She also claims that
13 "newly discovered evidence" necessitates addition of new claims and the identity of
14 doe defendants.

15 Plaintiff's Motion for Leave to Amend is **GRANTED**. Plaintiff may add Mr.
16 Kirkeby as co-plaintiff and new claims against Defendants. However, Plaintiff must
17 take care to cure the deficiencies pointed out in this Court's order. The Court also
18 cautions Plaintiff to make her best effort to include all possible claims against all
19 defendants in the Second Amended Complaint.

20 Further, as the Court has stated in previous orders, Plaintiff has provided no
21 reason to file motions without giving notice to Defendants. Any future ex parte
22 motions from Plaintiff will not be accepted.


23 **CONCLUSION**

24 Finding this Court lacks subject matter jurisdiction to hear this action,
25 Defendants' Motion to Dismiss for Lack of Jurisdiction is **GRANTED**. Plaintiff's
26 Motion to file a Second Amended Complaint is **GRANTED**. If Plaintiff believes
27 she can cure the deficiencies in the previous complaints, Plaintiff is **ORDERED** to
28 file any Second Amended Complaint on or before **April 15, 2015**. Finally,

1 Defendants' Motion to Dismiss for failure to state a claim (Docket No. 18) is
2 **DENIED as moot**. The action is **DISMISSED** without prejudice. The Clerk may
3 close the case.

4 **IT IS SO ORDERED.**

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6 Dated: March 5, 2015


7 HON. ROGER T. BENITEZ
8 United States District Judge

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